IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6603 OF 2004

Pandurang R. Todkar and others ... Petitioners

versus

Kaka Hari Todkar and others ... Respondents

...

Mr. Uday Warunjikar, for the Petitioners.

Mr. V. Talkute, for Respondent No.1.

...

CORAM : A.M.KHANWILKAR,J.

19th August 2004

P.C.:

. Heard Counsel for the parties. Rule. Rule made returnable forthwith by consent. Mr. Talkute waives notice for Respondent No. 1. It is agreed that the other Respondents are formal Respondents, for the nature of order that requires to be passed in the present petition. Hence, notice to the other Respondents is dispensed with. As short question is involved, petition is taken up for final disposal forthwith by consent.

. The order which is impugned in this petition was passed on the application preferred by Respondent No. 1 Plaintiff praying for injunction against the Petitioners from digging well in the suit property. The trial Court allowed the application preferred by Respondent No. 1. Before the trial Court, the Petitioners had given undertaking that they will not claim any equities if the trial was eventually to end in favour of the Respondent No. 1 Plaintiff. However, the trial Court did not accept the stated undertaking. The Petitioners carried the matter in appeal. Before the appellate Court, fresh undertaking was given by all the Petitioners, which is at pageof the Paper Book, clearly stating that the Petitioners will not claim any equities and the digging of well will be entirely done at the cost and risk of the Petitioners; and in the event, the Court was to decide the matter against the Petitioners, they will not claim any amount towards the costs incurred by them. Besides, the undertaking records that the Petitioners would permit the Respondent No.1 Plaintiff to avail of the well facility during the pendency of the proceedings.

Even such undertaking did not find favour with the appellate Court and the Appellate Court, instead, affirmed the view taken by the trial Court by the impugned judgment and order dated April 29, 2004.

. After hearing Counsel for the parties, to my mind, the undertaking given by the Petitioners was more than sufficient to secure the interests of the parties and to arrive at a workable arrangement during the pendency of the proceedings. To get over this position, Counsel for Respondent No. 1 would contend that the Petitioners were already in breach of undertaking given on the earlier occasion. However, neither of the Courts below have answered the issue against the Petitioners on that count. The learned Counsel is not in a position to point out from the impugned decisions that it is on that account the issue has been answered against the Petitioners. The learned Counsel for Respondent No. 1 then contends that the two Courts below have not accepted the undertaking given by the Petitioners and since the Courts have declined to exercise discretion in favour of the Petitioners, it is not open for this Court in exercise of writ

jurisdiction to hold to the contrary. This submission does not commend to me at all. Merely because two Courts below have not accepted the undertaking, that does not mean that this Court is precluded from considering as to whether the undertaking was just and proper and equitable order could be passed on that basis. To my mind, the appellate Court has committed manifest error in not accepting the fresh undertaking given before it on behalf of the Petitioners. The only reason that has weighed with the appellate Court is that the matter will consume time and it will be inappropriate to permit the Petitioners to enjoy the fruits of the well, as can be discerned from para 7 of the impugned judgment. This approach is wholly unacceptable. Merely because the litigant would get some benefit out of interim arrangement cannot be the basis to deny relief, if the same is just and proper. The nature of undertaking filed, to my mind, secures the interests of both the parties. Inasmuch as even the Respondent No. 1 Plaintiff will be entitled to avail of the well facility and it is not only the Petitioners Defendants who would be entitled to use the said well. Moreover, well is being dug entirely at the costs and risk of the

Petitioners and they have also assured that they will not claim any equities or any compensation for costs incurred by them, in the event the suit was to be decided against them. If it is so, to my mind, the Courts below have committed error in not exercising discretion in proper perspective. Accordingly, both the orders of the Courts below are set aside. The application preferred by Respondent No. 1 for injunction against the Petitioners from carrying on the work of digging of well in the suit land is rejected on condition that the Petitioners will abide by the undertaking as was given before the appellate Court (Exhibit 20, at page 46 of the Paper Book). Petition succeeds on the above terms. No order as to costs.

. At this stage, Counsel for Respondent No. 1 submits that the suit is pending since 1984. Besides, it is seen that some of the parties are senior citizens. In the circumstances, the trial Court may be well advised to expedite the hearing of the suit. If such application is made before the trial Court, the trial Court may pass necessary orders to ensure expeditious hearing of the suit.

. Parties to act on the authenticated copy of this order.

(A.M.KHANWILKAR,J.)